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UBER TECHNOLOGIES, INC.

11
12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA
14

15 MARISA LAINER, individually and
16 on behalf of all others similarly
situated,

17 Plaintiff,

18 vs.

19 UBER TECHNOLOGIES INC.,

20 Defendant.
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Case No. 15-CV-09925-BRO-MRW

**DEFENDANT UBER
TECHNOLOGIES, INC.'S NOTICE
OF MOTION AND MOTION TO
COMPEL ARBITRATION AND
DISMISS OR STAY LITIGATION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Date: May 16, 2016
Time: 1:30 p.m.

Hon. Beverly Reid O'Connell
Courtroom 14

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on May 16, 2016, at 1:30 p.m., or as soon thereafter as the matter may be heard in Courtroom 14 of the U.S. District Court for the Central District of California, located at 312 North Spring Street, Los Angeles, CA 90012, Defendant Uber Technologies, Inc. (“Uber”) will, and hereby does, move the Court for an order to compel individual arbitration of Plaintiff Marisa Lainer’s claims and dismiss this action with prejudice or, in the alternative, stay this action pending the completion of individual arbitration proceedings.¹ This Motion is made pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-14 and upon the grounds that Plaintiff agreed to arbitrate her claims when she consented to the arbitration provision in Uber’s Terms and Conditions.

This Motion is based on this Notice of Motion and Motion, Memorandum of Points and Authorities, the Declarations of Tipper Llaguno, Kyle Gabriel, and Tiffany Cheung, and all exhibits thereto, all documents in the Court’s file, and on such other argument as may be presented to the Court.

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¹ This motion satisfies Uber’s obligation to respond to the [First Amended Complaint \[ECF No. 16\]](#) at this stage. *See Lamkin v. Morinda Props. Weight Parcel, LLC*, 440 Fed. App’x 604, 607 (10th Cir. 2011); *JS Barkats PLLC v. BE, Inc.*, 12 Civ. 6779 (JFK), 2013 WL 444919, *2 (S.D.N.Y. Feb. 6, 2013) (“[P]arties are permitted to file motions to stay in lieu of an answer or other dispositive motions.”). Uber reserves the right to file a Rule 12(b) motion at a later time. *See Aetna Life Ins. Co. v. Alla Med. Servs., Inc.*, 855 F.2d 1470, 1475 (9th Cir. 1988).

1 This Motion is made following a conference of counsel pursuant to Local
2 Rule 7-3, which took place beginning on February 12, 2016 and continuing to
3 March 10-14, 2016. (Declaration of Tiffany Cheung, at ¶ 2.)
4

5 Dated: March 21, 2016

MORRISON & FOERSTER LLP

6
7 By: /s/ Tiffany Cheung
Tiffany Cheung

8 *Attorneys for Defendant*
9 **UBER TECHNOLOGIES, INC.**
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Marisa Lainer cannot unilaterally repudiate her binding contract with Uber. When she created an Uber account and accessed Uber’s services—which she has continued to use even after filing this action—Ms. Lainer expressly agreed to arbitrate the claims she asserts here on an individual basis. Filing this putative class action in federal court violates her binding agreement, and this action cannot proceed.

In January 2015, Plaintiff registered to use Uber’s services by creating an account using Uber’s mobile application (“Uber App”). As part of this registration process, Plaintiff agreed to be bound by Uber’s Terms and Conditions and Privacy Policy. The Terms and Conditions include a clear and conspicuous arbitration provision (“Arbitration Agreement”). Under the Arbitration Agreement, Plaintiff: (i) agreed to arbitrate “any dispute, claim or controversy arising out of or relating to the [Terms and Conditions, including the Privacy Policy] or the breach, termination, enforcement, interpretation or validity thereof or the use of Uber’s services”; and (ii) waived “the right to . . . participate as a plaintiff or class in any purported class action[.]” The Terms and Conditions and Privacy Policy specified that Uber may communicate with Plaintiff in a variety of ways, including by SMS message, and informed Plaintiff that Uber may use her personal information—including her mobile phone number—to, among other things, communicate with her in connection with improving its services and providing special offers.

Ignoring her Arbitration Agreement, Plaintiff has now filed a class action in this Court, alleging that Uber violated the Telephone Consumer Protection Act, 47 U.S.C. § 227, by sending her two “unsolicited text messages” that were “advertisements and/or promotional offers[.]” [ECF No. 16, ¶¶ 9, 25.] Uber contests this claim, but the Court need not (and should not) resolve the issue. The two alleged text messages fall squarely within the scope of communications

1 Plaintiff consented to receive when she registered to use Uber's services and
 2 availed herself of those services. Although Plaintiff may attempt to challenge these
 3 contractual provisions, that dispute must be arbitrated because it unequivocally
 4 "arises out of or relates to" the Terms and Conditions and Privacy Policy.

5 Binding U.S. Supreme Court and Ninth Circuit law require the enforcement
 6 of the Arbitration Agreement. The Court should grant Uber's motion and compel
 7 arbitration of Plaintiff's claims on an individual basis.

8 **II. FACTUAL BACKGROUND**

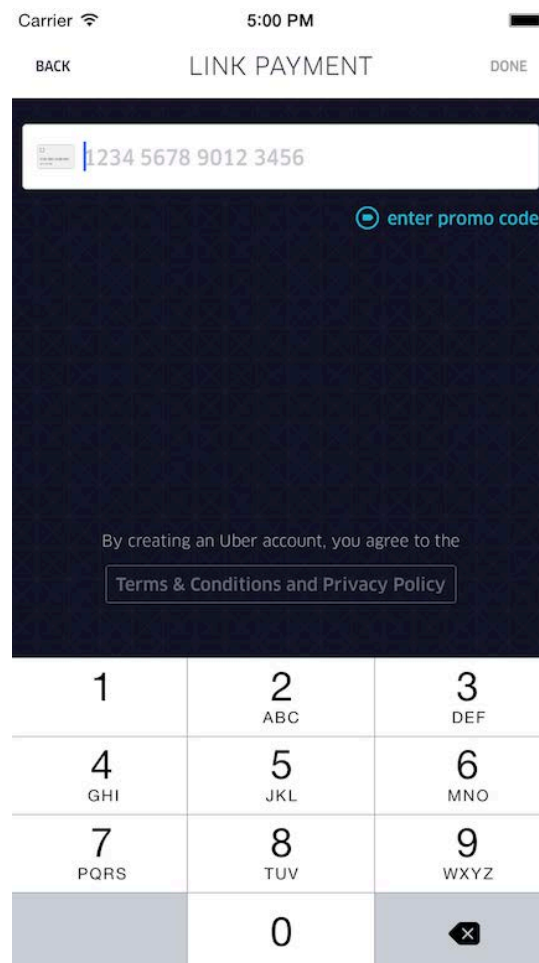
9 **A. Plaintiff Voluntarily Registered for Uber's Services.**

10 Uber's technology platform allows users to request transportation services
 11 from their smartphones via the Uber App. (Declaration of Kyle Gabriel ("Gabriel
 12 Decl."), ¶ 3.) Requests are transmitted to independent transportation providers in
 13 the area who are available to receive transportation requests. (*Id.*) Before users can
 14 take advantage of Uber's services, they register with Uber by creating an Uber
 15 account. (*Id.* at ¶ 4.)

16 Plaintiff used her iPhone to create an Uber account using the Uber App on
 17 January 3, 2015. (*Id.* at ¶ 5.) At that time, the iPhone registration process involved
 18 three basic steps, each of which was confined to a single screen. (*Id.* at ¶¶ 6, 7,
 19 Exh. A.) In the "Create An Account" screen, prospective registrants submitted their
 20 email address, mobile phone number, and a chosen password. (*Id.* at ¶ 7a.) The
 21 registrant would then need to hit the "next" button, lit at the top right of the screen,
 22 to move to the next step. (*Id.*) In the "Create A Profile" screen, registrants entered
 23 their first and last names for their user profile. (*Id.* at ¶ 7b.) Once again, the
 24 prospective registrant would then need to hit the "next" button at the top right of the
 25 screen to move to the next step. (*Id.*)

26 In the "Link Payment" screen, which was the final step, registrants were
 27 required to enter their credit card or PayPal information. (*Id.* at ¶ 7c.) When the
 28 registrant moved his/her cursor to the credit card information field, as Ms. Lainer

would have done, a numerical keyboard would appear. (*Id.*) On the same screen registrants were also informed that: “By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy.” The words “Terms & Conditions and Privacy Policy” were called out in bolded text and distinguished by a rectangular box that corresponded to a clickable button. (*Id.*)



(*Id.* at Exh. A.)

When the “Terms & Conditions and Privacy Policy” button was clicked, the registrant was taken to a screen that contained additional clickable buttons, one entitled “Terms & Conditions,” and another entitled “Privacy Policy,” each of which displayed a copy of the respective terms when clicked. (*Id.* at ¶ 7c.) To complete the Uber App registration process and create an Uber account, registrants then clicked the “DONE” button. (*Id.*)

1 **B. Plaintiff Consented to the Arbitration Agreement.**

2 Plaintiff unequivocally accepted and is bound by Uber's Terms and
3 Conditions. (*See* Declaration of Tipper Llaguno ("Llaguno Decl."), Exh. A.)
4 Plaintiff completed all steps necessary to register for Uber's services, including
5 voluntarily providing her mobile phone number to Uber and affirmatively clicking
6 "DONE" to confirm her agreement to the Terms & Conditions and Privacy Policy.
7 (Gabriel Decl. at ¶¶ 5, 7.) Pursuant to its terms, Uber has provided Plaintiff with
8 access to its services, and Plaintiff has accessed those services and taken trips on
9 more than twenty occasions since she signed up as an Uber user in January 2015.
10 (*Id.* at ¶ 5.) Notably, Plaintiff has accessed these services and taken trips on several
11 recent occasions even *after* filing her complaint on December 28, 2015, including
12 after her counsel was put on notice of her agreement to arbitrate. (*Id.*)

13 The first section of the applicable Terms and Conditions states that a
14 registrant's "access and use of the Services constitutes [his/her] agreement to be
15 bound by these Terms" and "establishes a contractual relationship between the
16 registrant and Uber." (Llaguno Decl., Exh. A at § 1.) This section also
17 incorporates Uber's Privacy Policy into the Terms and Conditions, and includes a
18 hyperlink to that Policy. (*Id.*)

19 The sixth section, titled "Dispute Resolution," states in relevant part:

20 **You agree that any dispute, claim or controversy**
21 **arising out of or relating to these Terms or the breach,**
22 **termination, enforcement, interpretation or validity**
23 **thereof or the use of the Services (collectively,**
24 **"Disputes") will be settled by binding arbitration**
25 **between you and Uber,** except that each party retains the
26 right to bring an individual action in small claims court
27 and the right to seek injunctive or other equitable relief in
28 a court of competent jurisdiction to prevent the actual or
 threatened infringement, misappropriation or violation of
 a party's copyrights, trademarks, trade secrets, patents or
 other intellectual property rights. **You acknowledge and**
 agree that you and Uber are each waiving the right to
 a trial by jury or to participate as a plaintiff or class in
 any purported class action or representative
 proceeding. Further, unless both you and Uber otherwise
 agree in writing, the arbitrator may not consolidate more

than one person's claims, and may not otherwise preside over any form of any class or representative proceeding.

(*Id.* at p. 8, § 6 [emphases added].) The provision also states that the American Arbitration Association ("AAA") will oversee any dispute, and explains how users can review the applicable arbitration rules:

The arbitration will be administered by the American Arbitration Association ("AAA") in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "AAA Rules") then in effect, except as modified by this "Dispute Resolution" section. (The AAA Rules are available at www.adr.org/arb_med or by calling the AAA at 1-800-778-7879.) The Federal Arbitration Act will govern the interpretation and enforcement of this Section.

(*Id.*)

The Arbitration Agreement permits users to arbitrate in their home counties, and allows for recovery of attorneys' fees only by users, not Uber:

Arbitration Location and Procedure. Unless you and Uber otherwise agree, the arbitration will be conducted in the county where you reside. . . .

Arbitrator's Decision. . . . If you prevail in arbitration you will be entitled to an award of attorneys' fees and expenses, to the extent provided under applicable law. Uber will not seek, and hereby waives all rights Uber may have under applicable law to recover, attorneys' fees and expenses if Uber prevails in arbitration.

(*Id.*) Uber also accepts the burden of paying **all** filing, administrative and arbitrator fees for non-frivolous claims:

Fees. Your responsibility to pay any AAA filing, administrator and arbitrator fees will be solely as set forth in the AAA Rules. However, if your claim for damages does not exceed \$75,000, Uber will pay all such fees unless the arbitrator finds that either the substance of your claim or the relief sought in your Demand for Arbitration was frivolous or was brought for an improper purpose[.]

(*Id.*) The Arbitration Agreement clearly and conspicuously delineates the waivers of the parties, including the waiver of any right to prosecute a class or representative action, and the numerous protections favorable to the user. (*Id.*)

1 **C. Plaintiff Agreed to Uber’s Privacy Policy.**

2 By creating an Uber account, Plaintiff also agreed to the Privacy Policy,
 3 which is incorporated into the applicable Terms and Conditions and explains how
 4 Uber uses the personal information it collects. (Llaguno Decl., Exh. A, § 1 (“Our
 5 collection and use of personal information in connection with the Services is as
 6 provided in Uber’s Privacy Policy located at [hyperlinked URL.]”); Exh. B,
 7 preamble (“This Privacy Policy is incorporated by reference into the applicable
 8 Terms and Conditions.”).) The Privacy Policy specifies that Uber “will
 9 communicate with you by email, telephone, or SMS or text message, in accordance
 10 with your wishes” and “may use your Personal Information . . . that we collect
 11 about you:

12 i. To provide you with information or services or process
 13 transactions that you have requested or agreed to receive
 14 including to send you electronic newsletters, or to provide
 15 you with special offers or promotional materials . . . on
 16 behalf of us or third parties. . . .

17 iii. To improve the Services or our services, to customize
 18 your experience with the Services, or to serve you specific
 19 content that is most relevant to you.

20 . . .

21 iv. To enable you to participate in a variety of the
 22 Services’ features . . .

23 v. To contact you with regard to your use of the
 24 Services[.]

25 (Exh. B, pp. 15-16, § 2.) It also contains a detailed explanation about how users
 26 can cancel or modify the communications they receive from Uber. (*Id.* at § 8.)

27 **D. Plaintiff Ignored the Arbitration Agreement and Filed This**
 28 **Putative Class Action Lawsuit.**

29 Plaintiff alleges that Uber violated the Telephone Consumer Protection Act
 30 (“TCPA”) by sending her two “unsolicited text messages,” including
 31 “advertisements and/or promotional offers, via text message” to Plaintiff’s cellular

1 telephone. [ECF No. 16, ¶¶ 9, 25.] This is *precisely* the type of dispute
 2 encompassed by the Arbitration Agreement. (Llaguno Decl., Exh. A, § 6.) Despite
 3 consenting to the Arbitration Agreement and binding class action waiver, Plaintiff
 4 filed this putative class action lawsuit in violation of the Arbitration Agreement.
 5 Although Uber has apprised Plaintiff of the enforceability and applicability of the
 6 Arbitration Agreement, Plaintiff has elected to proceed with her case (but continues
 7 to use Uber’s services). (Declaration of Tiffany Cheung, at ¶ 2; Gabriel Decl. at
 8 ¶ 5.)

9 **III. LEGAL STANDARD**

10 The Federal Arbitration Act (“FAA”) reflects a liberal federal policy favoring
 11 arbitration, and requires that arbitration agreements be rigorously enforced. *See*
 12 *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (“courts must place
 13 arbitration agreements on an equal footing with other contracts”). “[T]he FAA’s
 14 purpose is to give preference (instead of mere equality) to arbitration provisions.”
 15 *Mortensen v. Bresnan Commc’ns LLC*, 722 F.3d 1151, 1160 (9th Cir. 2013). “As
 16 arbitration is favored, those parties challenging the enforceability of an arbitration
 17 agreement bear the burden of proving that the provision is unenforceable.” *Id.* at
 18 1157 (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 91-92 (2000)).

19 The FAA provides that contractual arbitration agreements “shall be valid,
 20 irrevocable, and enforceable, save upon such grounds as exist at law or in equity for
 21 the revocation of any contract.” 9 U.S.C. § 2. A court *must* compel arbitration if:
 22 the transaction involves interstate commerce and (1) a written arbitration agreement
 23 exists; and (2) the agreement encompasses the dispute at issue. *Chiron Corp. v.*
 24 *Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

25 **IV. PLAINTIFF MUST INDIVIDUALLY ARBITRATE HER CLAIMS**

26 **A. Uber’s Terms and Conditions Involve Interstate Commerce.**

27 Both the express terms of the Arbitration Agreement and the nature of the
 28 relationship between the parties confirm that the FAA governs. The FAA “governs

1 the enforceability of arbitration agreements in contracts involving interstate
 2 commerce.” *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir. 2013);
 3 *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274-77 (1995) (interpreting
 4 the FAA’s “involving commerce” provision as broadly as the phrase “affecting
 5 commerce”; the FAA should be applied with the full reach of Congress’ powers
 6 under the Commerce Clause).

7 When registering to use Uber’s services in January 2015, Plaintiff agreed to
 8 Uber’s Terms and Conditions and Privacy Policy. (Gabriel Decl., ¶¶ 5-7.) The
 9 Terms and Conditions grant users a limited authorization to use Uber’s online
 10 platform. (Llaguno Decl., Exh. A, § 2.) Where, as here, the underlying
 11 transactions involve the use of Internet technologies to transmit user requests across
 12 a network of independent drivers in over 100 cities across the United States, the
 13 “involving commerce” requirement has been met. *See Nguyen v. Barnes & Noble*
 14 *Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014) (applying the FAA to a dispute involving
 15 internet commerce); *United States v. Sutcliffe*, 505 F.3d 944, 953 (9th Cir. 2007)
 16 (“the Internet is an instrumentality and channel of interstate commerce”) (internal
 17 quotation marks omitted). Indeed, Plaintiff alleges that this Court’s subject matter
 18 jurisdiction is based on the fact that Uber’s services are provided to customers
 19 across the country, therefore implicating interstate commerce and the FAA. [ECF
 20 No. 16, ¶ 2.]

21 **B. Plaintiff Entered into a Valid Agreement to Arbitrate.**

22 In determining whether a valid arbitration agreement exists, federal courts
 23 “apply ordinary state-law principles that govern the formation of contracts.” *First*
 24 *Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Here, the Terms
 25 and Conditions are “governed by and construed in accordance with the laws of the
 26 State of California, U.S.A.” (Llaguno Decl., Exh. A, § 7.)

27 Applying California law, mutual assent to contract “may be manifested by
 28 written or spoken words, or by conduct,” *Binder v. Aetna Life Ins. Co.*, 75 Cal.

1 App. 4th 832, 850 (1999), and acceptance of contract terms may be implied through
 2 action or inaction. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-95
 3 (1991). Thus, “an offeree, knowing that an offer has been made to him but not
 4 knowing all of its terms, may be held to have accepted, by his conduct, whatever
 5 terms the offer contains.” *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal.
 6 App. 3d 987, 992 (1972) (citations omitted).

7 Customers are placed on notice of the terms to which they are assenting
 8 where they are provided an opportunity to review and confirm agreement with
 9 terms of service. Indeed, courts routinely enforce online agreements where users
 10 click a button indicating they consent to hyperlinked terms of service. *See Swift v.*
 11 *Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 908 (N.D. Cal. 2011) (user bound
 12 by arbitration provision because she was told that, “By using YoVille, you also
 13 agree to the YoVille [hyperlink] Terms of Service” and the user proceeded)²; *see*
 14 *also Nicosia v. Amazon.com, Inc.*, No. 14-CV-4513 (SLT) (MDG), 2015 WL
 15 500180, at *5 (E.D.N.Y. Feb. 4, 2015) (online customer was bound by contract
 16 terms where website stated that, “By placing your order, you agree to
 17 Amazon.com’s privacy notice and conditions of use,” which were reachable by a
 18 hyperlink); *Starke v. Gilt Groupe, Inc.*, No. 13-CIV-5497 (CLS), 2014 WL
 19 1652225, *3 (S.D.N.Y. Apr. 24, 2014) (enforcing arbitration provision in
 20 hyperlinked Terms of Use; plaintiff’s “decision to click the ‘Shop Now’ button
 21 represents his assent to [the Terms].”).³

22 This case is no different. The Uber registration process that Plaintiff

24 ² It is sufficient to “requir[e] a user to affirmatively accept the terms, even if
 25 the terms are not presented on the same page as the acceptance button” as long as
 the user has “access to the terms of service.” *Id.* at 912.

26 ³ *See also Crawford v. Beachbody, LLC*, No. 14-CV-1583 GPC, 2014 WL
 27 6606563, at *3 (S.D. Cal. Nov. 5, 2014); *5381 Partners LLC v. Shareasale.com,*
 28 *Inc.*, No. 12-CV-4263 (JFB), 2013 WL 5328324, at *4 (E.D.N.Y. Sept 23, 2013);
Fteja v. Facebook, Inc., 841 F. Supp. 2d 829, 837-38 (S.D.N.Y. 2012).

completed consists of three basic steps, each confined to a single screen with specific fields to complete. (Gabriel Decl., ¶¶ 6, 7, Exh. A.) To complete the registration process and create an Uber account, Plaintiff affirmatively and voluntarily provided Uber with her mobile phone number and clicked the “DONE” button, which appeared above a clickable button stating that “[b]y creating an Uber account, you agree to the Terms & Conditions and Privacy Policy.” (*Id.* at ¶ 7c, Exh. A.) The phrase “Terms & Conditions and Privacy Policy” was highlighted and hyperlinked to full copies of each document, giving Plaintiff an opportunity to review those terms. (*Id.*) Plaintiff was therefore on notice that by creating her Uber account, she was consenting to the Arbitration Agreement. Accordingly, Plaintiff is bound by the terms of this Agreement whether she actually read them or not. *See Garcia v. Enter. Holdings, Inc.*, 78 F. Supp. 3d 1125, 1137 (N.D. Cal. 2015) (in the context of online transactions, “the terms of the agreement are binding, even if the user did not actually review the agreement, provided that the user had actual knowledge of the agreement or the website put a ‘reasonably prudent user on notice of the terms of the contract.’”).

C. The Parties’ Agreement Requires the Arbitrator to Decide All Issues of Arbitrability.

When parties “clearly and unmistakably” demonstrate an intent to have the arbitrator decide issues of arbitrability, those issues should be referred to the arbitrator. *Oracle Am. Inc. v. Myriad Grp., A.G.*, 724 F.3d 1069, 1072 (9th Cir. 2013). In those circumstances, the court’s inquiry is limited to whether the assertion of arbitrability is “wholly groundless.” *Clarium Capital Mgmt. LLC v. Choudhury*, No. 08-5157SBA, 2009 WL 331588, at *5 (N.D. Cal. Feb. 11, 2009).

The Arbitration Agreement expressly incorporates the AAA Commercial Arbitration Rules.⁴ (Llaguno Decl., Exh. A at § 6.) This is “clear and

⁴ “The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the

1 unmistakable” evidence that the parties agreed to delegate gateway questions of
 2 arbitrability to the arbitrator. *See, e.g., Crook v. Wyndham Vacation Ownership,*
 3 *Inc.*, No. 13-CV-03669-WHO, 2013 WL 6039399, at *6 (N.D. Cal. Nov. 8, 2013)
 4 (“Virtually every circuit to have considered the issue has determined that
 5 incorporation of the [AAA] rules constitutes clear and unmistakable evidence that
 6 the parties agreed to arbitrate arbitrability”) (citing *Oracle*, 724 F.3d at 1074);
 7 *Dream Theater, Inc. v. Dream Theater*, 124 Cal. App. 4th 547, 557 (2004)
 8 (incorporation of AAA Rules deemed “clear and unmistakable evidence of the
 9 intent that the arbitrator will decide whether a Contested Claim is arbitrable.”) Any
 10 disputes regarding arbitrability must be resolved by the arbitrator.

11 **D. The Arbitration Agreement Encompasses the Dispute at Issue.**

12 Given that the Arbitration Agreement delegates questions of arbitrability to
 13 the arbitrator, Uber must simply have a basis for demanding arbitration that is not
 14 “wholly groundless.” *Clarium*, 2009 WL 331588, at *5. The FAA requires that
 15 courts compel arbitration “unless it may be said with *positive assurance* that the
 16 arbitration clause is not susceptible of an interpretation that covers the asserted
 17 dispute[.]” *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 650
 18 (1986) (emphasis added). “[A]ny doubts concerning the scope of arbitrable issues
 19 should be resolved in favor of arbitration.” *Mitsubishi Motors Corp. v. Soler*
 20 *Chrysler Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

21 The Arbitration Agreement broadly defines the scope of arbitrable disputes to
 22 include “**any dispute, claim or controversy arising out of or relating to these**
 23 **Terms or the breach, termination, enforcement, interpretation or validity thereof or**
 24 **the use of the Services[.]**” (Llaguno Decl., Exh. A at § 6 [emphasis added].) “The
 25

26 arbitration agreement or to the arbitrability of any claim[.]” AAA COMMERCIAL
 27 ARBITRATION RULES AND MEDIATION PROCEDURES at R-7(a)
 28 (https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased) (effective October 1, 2013; last accessed March 21, 2016).

1 use of the ‘relat[ing] to’ language is a signal that the scope of the agreement is
 2 broad under Ninth Circuit case law and encompasses claims beyond the four
 3 corners of the contract.” *Delgado v. Progress Fin. Co.*, No. 1:14-cv-00033-LJO-
 4 MJS, 2014 WL 1756282, at *5 (E.D. Cal. May 1, 2014); *In re TFT-LCD (Flat*
 5 *Panel) Antitrust Litig.*, No. 04-1827 SI, 2011 WL 2650689, at *5 (N.D. Cal. July 6,
 6 2011) (“the language ‘related to’ must be read broadly” to encompass “matters that,
 7 while not arising directly under the contractual relationship, are nevertheless related
 8 to it.”). In the face of a contract with “relating to” language, “Plaintiff’s claims
 9 need only ‘touch matters’ covered by the contract containing the arbitration
 10 provision.” *Koyoc v. Progress Fin. Co.*, No. CV 13-09165-RSWL (AGRx), 2014
 11 WL 1878903, at *4 (C.D. Cal. May 9, 2014) (citation omitted).

12 In the context of TCPA cases, courts broadly construe arbitration clauses that
 13 include “arising out of or relating to” language and routinely compel arbitration
 14 where the alleged TCPA violation is intertwined with the underlying contract. *See*
 15 *id.* at *6 (rejecting plaintiff’s argument that TCPA claim was independent from the
 16 contract because it necessarily required contractual interpretation); *Fischer v. Rent-*
 17 *A-Center, Inc.*, No.14-cv-00918-MCE-AC, 2014 WL 3729553, at *4-5 (E.D. Cal.
 18 July 24, 2014) (compelling arbitration of TCPA claim based on communications
 19 regarding payments on furniture rental contract); *Sherman v. RMH, LLC*, No.
 20 13cv1986-WQH-WMc, 2014 WL 30318, at *8-9 (S.D. Cal. Jan. 2, 2014)
 21 (compelling arbitration of TCPA claim based on telephone call about status review
 22 of prior vehicle purchase through an installment sale contract).⁵

23
 24
 25 ⁵ *See also Cayanan v. Citi Holdings, Inc.*, 928 F. Supp. 2d 1182, 1207-08
 26 (S.D. Cal. 2013); *Mendoza v. Ad Astra Recovery Servs. Inc.*, No. 2:13-cv-06922-
 27 CAS(JCGx), 2014 WL 47777, at *3 (C.D. Cal. Jan. 6, 2014); *Brown v. DirecTV,*
 28 *LLC*, No. CV 12-08382 DMG (Ex), 2013 WL 3273811, at *4-6 (C.D. Cal. June 26,
 2013); *McNamara v. Royal Bank of Scotland Group, PLC*, No. 11-cv-2137-
 L(WVG), 2012 WL 5392181, at *6-7 (S.D. Cal. Nov. 5, 2012).

1 The Arbitration Agreement leaves no doubt that Plaintiff's claims fall
 2 squarely within the agreement. Plaintiff's claims are based on the allegation that
 3 the two accused text messages were sent without Plaintiff's consent. [ECF No. 16,
 4 ¶¶ 21, 25.] But the types of communications that Plaintiff consented to receiving
 5 from Uber were addressed in the binding agreement between Plaintiff and Uber,
 6 and included precisely the type of messages alleged to be at issue here.⁶ (Llaguno
 7 Decl., Exh. A, §§ 1, 6; Exh. B, § 2.) Plaintiff's claims are therefore encompassed
 8 by the Arbitration Agreement. See *Delgado*, 2014 WL 1756282, at *5-6
 9 (compelling arbitration where agreement included broad language and disclosed
 10 methods defendant might use to communicate with plaintiff about his account).

11 **E. The Arbitration Agreement Is Not Unconscionable.**

12 The party opposing arbitration bears the burden of proving unconscionability.
 13 *Pinnacle Museum Tower Ass'n v. Pinnacle Market Dev., LLC*, 55 Cal. 4th 223, 236
 14 (2012). The FAC does not allege that the Arbitration Agreement is unenforceable,
 15 which should end the inquiry, but to the extent the Court considers the issue, there
 16 is no unconscionability here.

17 The Court's analysis is limited to whether the arbitration provision is itself
 18 unconscionable. See *Rent-A-Center W., Inc. v. Jackson*, 561 U.S. 63, 70-71 (2010)
 19 ("[A] party's challenge to another provision of the contract, or to the contract as a
 20 whole, does not prevent a court from enforcing a specific agreement to arbitrate.").
 21 Moreover, "a contract provision is unenforceable due to unconscionability only if it
 22 is both procedurally and substantively unconscionable." *Bosinger v. Belden CDT*,
 23 *Inc.*, 358 F. App'x 812, 814 (9th Cir. 2009) (citation omitted).

25 ⁶ Plaintiff's voluntary provision of her cell phone number to Uber and her
 26 express contractual consent to receive the text message at issue also preclude her
 27 TCPA claim on the merits. See e.g., *Van Patten v. Vertical Fitness Grp., LLC*, 22
 28 F. Supp. 3d 1069, 1073 (S.D. Cal. 2014). This defense is appropriately resolved by
 the arbitrator or a small claims court, as required by Uber's agreement with
 Plaintiff.

1 The Arbitration Agreement is not procedurally unconscionable because (1) it
 2 is not oppressive and (2) Plaintiff was not surprised by it. *Pinnacle Museum, 55*
 3 *Cal. 4th at 246*. Plaintiff had a meaningful choice whether to accept the Terms and
 4 Conditions and take advantage of Uber’s platform—she could have easily declined
 5 those terms and used an alternative means of requesting transportation. *See Belton*
 6 *v. Comcast Cable Holdings, LLC, 151 Cal. App. 4th 1224, 1245 (2007)* (“The
 7 availability of alternative sources from which to obtain the desired service defeats
 8 any claim of oppression, because the consumer has a meaningful choice.”).

9 Nor did the provision “surprise” Plaintiff. The Terms and Conditions
 10 containing the Arbitration Agreement were prominently called out and hyperlinked
 11 on the account sign-up page and were readily accessible to Plaintiff. (Gabriel
 12 Decl., ¶ 7c, Exh. A.) Uber “was under no obligation to highlight the arbitration
 13 clause of its contract, nor was it required to specifically call that clause to
 14 [Plaintiff’s] attention.” *Sanchez v. Valencia Holding Co., LLC, 61 Cal. 4th 899,*
 15 *915 (2015)*. Even so, the Arbitration Agreement is written in plain English and is
 16 conspicuously displayed under the bolded heading “**Dispute Resolution**”—not
 17 “hidden within a prolix printed form.” (Llaguno Decl., Exh. A, § 6; *Jones v. Wells*
 18 *Fargo Bank, 112 Cal. App. 4th 1527, 1539 (2003)*; *see also Morris v. Redwood*
 19 *Empire Bancorp, 128 Cal. App. 4th 1305, 1321 (2005)* (“a clear heading in a
 20 contract may refute a claim of surprise”); *Estrada v. CleanNet USA, Inc., No. C 14-*
 21 *01785 JSW, 2015 WL 833701, at *3 (N.D. Cal. Feb. 24, 2015)* (compelling
 22 arbitration; finding, *at most*, only a “minimal amount of procedural
 23 unconscionability” where “dispute resolution provisions were clearly labeled, with
 24 bolded, capitalized section[s]”).) Under this heading, the Terms clearly state: “You
 25 acknowledge and agree that you and Uber are each waiving the right to a trial by
 26 jury or to participate as a plaintiff or class in any purported class action or
 27 representative proceeding.” (Llaguno Decl., Exh. A, § 6.)

28 Nor is the Arbitration Agreement substantively unconscionable. To prove

substantive unconscionability, Plaintiff must show that the arbitration clause is “so one-sided as to shock the conscience.” *Pinnacle*, 55 Cal. 4th at 246 (internal quotations omitted). Far from being one-sided, the Arbitration Agreement is bilateral and safeguards Plaintiff’s ability to pursue a small claims action or an individual arbitration. Uber has agreed to pay all of Plaintiff’s “filing, administrative and arbitrator fees” for arbitration of non-frivolous claims under \$75,000, and statutory damages for Plaintiff’s claims based on two text messages cannot exceed \$3,000. (Llaguno Decl., Exh. A at § 6.) Plaintiff can also recover attorneys’ fees and expenses if she prevails in arbitration; Uber has waived its corresponding right. (*Id.*) And, Plaintiff is not faced with significant travel expenses because Uber has agreed to conduct the arbitration in Plaintiff’s home county. (*Id.*) If Plaintiff prefers small claims court, she retains her right to choose that forum. (*Id.*) These provisions defeat any claimed unconscionability. *See Ulbrich v. Overstock.com, Inc.*, 887 F. Supp. 2d 924, 933-34 (N.D. Cal. 2012) (rejecting unconscionability challenge even where arbitration provision required individuals to share in costs of arbitration, set the arbitration out-of-state, and lacked mutuality in the remedies available to the parties); *see also Crook*, 2013 WL 6039399, at *5 (no unconscionability even where the provision required the parties to share fees and costs of arbitration and required travel to an arbitration forum outside plaintiffs’ home county).

V. THE ACTION SHOULD BE DISMISSED OR STAYED PENDING THE COMPLETION OF INDIVIDUAL ARBITRATION.

Courts are required to “rigorously enforce agreements to arbitrate.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). The FAA “mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Rep. of Nicar. v. Standard Fruit Co.*, 937 F.2d 469, 475 (9th Cir. 1991) (citation omitted). Here, Plaintiff entered a valid and binding Arbitration Agreement on January 3, 2015, and this Agreement covers

1 Plaintiff's claims. Binding precedent compels the Court to direct Plaintiff to
2 resolve this dispute in individual arbitration.

3 Since Plaintiff must arbitrate her claims or pursue them in small claims court,
4 the Court may dismiss the entire case, including her putative class claims. *See*
5 *Lewis v. UBS Fin. Servs., Inc.*, 818 F. Supp. 2d 1161, 1165 (N.D. Cal. 2011).
6 Dismissal of claims brought on behalf of a putative class is proper upon granting a
7 motion to compel arbitration with respect to the named plaintiff. *See Sheffer v.*
8 *Samsung Telecomms. Am., LLC*, No. CV-13-3466 GW (AJWx), 2014 WL 792124,
9 at *1 (C.D. Cal. Feb. 6, 2014) ("Because the arbitration agreement calls for
10 individual arbitration of all of Plaintiff's claims in this action, Plaintiff's class-
11 based claims are dismissed with prejudice."); *Dang v. Samsung Elecs. Co.*, No. 14-
12 CV-00530 LHK, 2015 WL 4735520, at *11 (N.D. Cal. Aug. 10, 2015) (dismissal is
13 appropriate where "the arbitration clause [is] broad enough to bar all of the
14 plaintiff's claims"); *Graf v. Match.com, LLC*, No. CV-15-3911 PA (MRWx), 2015
15 WL 4263957, at *6 (C.D. Cal. July 10, 2015) ("Given that all of Plaintiff's claims
16 are subject to arbitration, this [putative class] action is dismissed.") (citation
17 omitted).

18 Dismissal of putative class claims is also proper because Plaintiff agreed to
19 the class action waiver in Uber's Terms and Conditions. *See Concepcion*, 563 U.S.
20 at 344, 352 (enforcing class action waiver in defendant's arbitration agreement
21 because the "principal purpose" of the FAA is to "ensur[e] that private arbitration
22 agreements are enforced according to their terms"); *Dauod v. Ameriprise Fin.*
23 *Servs., Inc.*, No. 10-CV-00302 CJC (MANx), 2011 WL 6961586, at *6 (C.D. Cal.
24 Oct. 12, 2011) (holding class action waiver was enforceable and dismissing action
25 where individual claims were subject to arbitration). Because all of plaintiff's
26 claims must be resolved through individual, binding arbitration, this case should be
27 dismissed. In the alternative, the Court may stay this case pending the results of
28 individual arbitration. *See* 9 U.S.C. § 3; *Luchini v. Carmax, Inc.*, No. CV F 12-

1 0417 LJO DLB, 2012 WL 2995483, at *15 (E.D. Cal. July 23, 2012) (“[A] court
2 can properly stay a suit before it if *any* issue in the suit is arbitrable[.]”) (citation
3 omitted).

4 **VI. CONCLUSION**

5 Plaintiff must individually arbitrate all of her present claims against Uber
6 because she voluntarily entered into an enforceable Arbitration Agreement covering
7 the dispute at issue. Alternatively, she may pursue her claims in small claims court.
8 Uber respectfully requests that the Court grant its motion to compel arbitration and
9 dismiss, or in the alternative, stay, Plaintiff’s claims.

10
11 Dated: March 21, 2016

MORRISON & FOERSTER LLP

12
13 By: /s/ Tiffany Cheung
14 Tiffany Cheung

15 *Attorneys for Defendant*
16 **UBER TECHNOLOGIES, INC.**
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21st day of March, 2016, the foregoing document was filed electronically on the CM/ECF system, which caused all CM/ECF participants to be served by electronic means.

Dated: March 21, 2016

MORRISON & FOERSTER LLP

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